

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

APR 19 2007

COURT OF APPEALS
DIVISION TWO

AMY H.,)	
)	
Appellant,)	2 CA-JV 2006-0031
)	DEPARTMENT B
)	
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
ARIZONA DEPARTMENT OF)	Rule 28, Rules of Civil
ECONOMIC SECURITY and)	Appellate Procedure
EMMA H.,)	
)	
Appellees.)	
)	

APPEAL FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. MD20050073

Honorable Robert Duber, II, Judge

AFFIRMED

David J. Martin

Lakeside
Attorney for Appellant

Terry Goddard, Arizona Attorney General
By Eric Devany

Mesa
Attorneys for Appellee Arizona
Department of Economic Security

E S P I N O S A, Judge.

¶1 Appellant Amy H. is the mother of Emma H., who was born prematurely on July 30, 2004. Amy appeals from the juvenile court’s April 2006 order adjudicating Emma dependent following a contested dependency hearing. Finding that reasonable evidence supports the juvenile court’s ruling and that the issues Amy raises do not warrant reversal, we affirm.

¶2 As defined in A.R.S. § 8-201(13), a dependent child includes one:

(i) In need of proper and effective parental care and control and who has no parent or guardian, or one who has no parent or guardian willing to exercise or capable of exercising such care and control.

(ii) Destitute or who is not provided with the necessities of life, including adequate food, clothing, shelter or medical care.

(iii) A child whose home is unfit by reason of abuse, neglect, cruelty or depravity by a parent, a guardian or any other person having custody or care of the child.

Because “[t]he primary consideration in a dependency case is always the best interest of the child[,] . . . the juvenile court is vested with ‘a great deal of discretion.’” *Ariz. Dep’t of Econ. Sec. v. Superior Court*, 178 Ariz. 236, 239, 871 P.2d 1172, 1175 (App. 1994), quoting *In re Cochise County Juvenile No. 5666-J*, 133 Ariz. 157, 160, 650 P.2d 459, 462 (1982).

¶3 The petitioner’s burden of proof in a dependency proceeding is by a preponderance of the evidence. A.R.S. § 8-844(C)(1); Ariz. R. P. Juv. Ct. 55(C), 17B A.R.S.; *Cochise County No. 5666-J*, 133 Ariz. at 159, 650 P.2d at 461. On appeal, we view

the evidence and the reasonable inferences permitted by the evidence in the light most favorable to sustaining the juvenile court's findings, and we will affirm a dependency adjudication unless there is no evidence to support it. *In re Maricopa County Juvenile Action No. J-75482*, 111 Ariz. 588, 591, 536 P.2d 197, 200 (1975); *In re Pima County Juvenile Action No. 118537*, 185 Ariz. 77, 79, 912 P.2d 1306, 1308 (App. 1994).

¶4 Pursuant to A.R.S. § 8-841(B)(3), a dependency petition must include “[a] concise statement of the facts to support the conclusion that the child is dependent.” The petition in this case alleged that Emma is a medically fragile child who, at age fourteen months, weighed only fourteen pounds and was failing to thrive. The petition alleged medical neglect because Emma’s medical condition had necessitated multiple hospitalizations, after which Amy had “failed to follow through with follow up medical visits.” The petition further alleged Amy lacked safe and stable housing and was unable to parent, possibly due to drug use. The state dismissed an additional allegation that mental health issues contributed to Amy’s inability to parent. Following a two-day adjudication hearing, the juvenile court found the allegations of dependency proven by a preponderance of the evidence.

¶5 Of the three issues Amy raises on appeal, we turn first to her final contention that the court’s dependency finding was not supported by competent evidence and was therefore clearly erroneous. The court’s findings and conclusions include the following:

6. The child, Emma, was born prematurely; however, before she left the hospital, she had been determined to be

medically able to leave and her mother had been appropriately instructed on medical care and follow-up.

7. Including her birth hospitalization, the child, Emma who is not two (2) years old, had been hospitalized six times before the dependency trial.

8. The Court heard testimony from several doctors. Each doctor related that Amy H[.] had been somewhat compliant with their medical instructions for the care of the child. Significantly, however, there was a lack of continuity of care with sporadic compliance and non-compliance.

9. The child is unusually susceptible to severe health risks. She has been fed through a feeding tube most of her life. Failure to monitor her calorie consumption and weight fluctuation resulted in her multiple hospitalizations.

10. When the child has been hospitalized and since the child has lived with the maternal grandmother and mother, the child's physical condition has significantly improved. However, the child has effectively lost the ability to swallow and eat food normally, which requires re-training and additional medical procedures.

11. The mother is cognitively capable of understanding the needs of her child, but she has failed to demonstrate through behavior that she recognized how gravely ill her child was before she was hospitalized.

12. For a normally healthy child, the Court would conclude that the mother was minimally capable of providing medical care for her child. For this child, however, the Court concludes that the mother has neglected the child's medical needs.

A clear preponderance of the evidence supports the court's findings, which, in turn, sustain its legal conclusion that Emma is dependent because Amy has shown herself to be either

unable or unwilling to meet Emma’s special medical needs. The record belies Amy’s claim that the juvenile court’s conclusion was clearly erroneous.

¶6 In her two other contentions on appeal, Amy claims she was “penalized” for exercising her constitutional right against self-incrimination when she refused to submit to drug testing during the adjudication hearing and, second, that she was denied due process of law by the introduction of evidence at the hearing concerning her relationship with her current boyfriend, James Armstrong. Although both issues are in some sense collateral to the issue of Emma’s dependency, given the statutory definition of a dependent child, we nonetheless address each issue briefly.

¶7 During the adjudication hearing, the juvenile court instructed Amy to submit to urinalysis on the afternoon of the second day of trial. The court’s stated reasons for doing so were its concern that Amy might still be “actively utilizing methamphetamine” and the fact that she had successfully resisted a number of earlier requests to submit to hair follicle testing and urinalysis. Through counsel, Amy refused to provide a urine sample on grounds of “privilege,” the Fourth Amendment’s protection against unlawful search and seizure, denial of due process based on lack of notice, and “rudimentary . . . fairness.”

¶8 Amy now claims that she was “penalized” for her refusal and that “the finding of dependency relative to illegal drug use was solely based upon her assertion of the Fifth Amendment privilege” against self-incrimination. She contends that, based solely on her refusal to submit to urinalysis during the hearing, the juvenile court found Emma dependent

and Amy “unfit or unable to parent due to substance abuse issues.” In fact, however, the court made no such finding. Of its nineteen numbered findings, only two mentioned Amy’s drug use:

18. Mother admitted to using drugs during her pregnancy but the child was not born with drugs or drug metabolites in her system.

19. Mother’s demeanor at trial suggested that she might be using drugs; the Court directed mother to submit to a urinalysis, which she declined to do. The Court makes an adverse inference that a urinalysis would disclose recent drug use.

¶9 Although the juvenile court could not—and did not—compel Amy to admit criminal misconduct, it could properly require her to participate in reunification services including urinalysis and other diagnostic tests. *See generally Minh T. v. Ariz. Dep’t of Econ. Sec.*, 202 Ariz. 76, ¶ 16, 41 P.3d 614, 618 (App. 2001) (requiring participation in services not tantamount to requiring parents to incriminate themselves; “difficult choices” facing parents in complying with requirement resulted from their actions, and Fifth Amendment did not spare them the choice). The court was also permitted to draw a negative inference from Amy’s refusal to participate. *Montoya v. Superior Court*, 173 Ariz. 129, 131, 840 P.2d 305, 307 (App. 1992). That inference, “that a urinalysis would disclose recent drug use,” still fell considerably short of being, as Amy contends, a finding that she “is unfit or unable to parent due to substance abuse issues.”¹

¹Although Amy has argued the matter at length, the issue of her drug use was neither the main focus of the juvenile court’s inquiry nor among its central findings. The pivotal

¶10 Amy’s remaining contention is that the admission of evidence concerning her relationship with James Armstrong violated her right to due process. She claims she lacked notice that the state would argue the relationship was a factor contributing to Emma’s dependency. Patricia Rose, the psychologist who had evaluated Amy in February 2006 at the request of Child Protective Services, described Armstrong as “a person with a known history of legal problems, who has always been physically abusive to [Amy.]” Rose testified that Amy’s relationship with Armstrong was “a very dangerous distraction in her life given the special needs of her daughter” and was evidence of poor judgment on Amy’s part. The nature of the relationship thus provided relevant context and potentially a further explanation for Emma’s dependency. Moreover, Amy clearly did have prior notice that her relationship with Armstrong was both problematic and relevant. The available record refutes her contention that she was denied procedural due process.

¶11 The amended dependency petition alleged that Amy was “unfit or unable to parent due to neglect” and was “unable or unwilling” to provide Emma “with appropriate supervision, food, or medical care, placing [Emma’s] health or welfare at substantial risk.”

issue was whether Emma was dependent as the result of medical neglect, and substance abuse was simply one possible factor affecting Amy’s parenting that could neither establish nor disprove Emma’s dependency but could serve to explain why Amy was failing to meet Emma’s needs. The statutory definition of dependency focuses on the child and whether the child’s needs are being met by the parent, not on the parent’s state of mind, intent, or the reasons for the parent’s failure to exercise “proper and effective parental care and control” and provide “adequate food, clothing, shelter [and] medical care.” A.R.S. § 8-201(13)(i), (ii).

Although Armstrong was not named in the dependency petition, allegations of domestic violence in their relationship had led the court in January 2006 to order that Armstrong have no unsupervised contact with Emma. The relationship, its negative influence on Amy, and the potential danger Armstrong posed to Emma were also cited in Rose's written report as evidence of Amy's questionable judgment. We thus reject Amy's assertion that she lacked notice and was denied procedural due process. And, even had she been surprised by the testimonial references to her relationship to Armstrong, she was not prejudiced, given the considerable medical evidence establishing that Emma met the statutory definition of a dependent child.

¶12 For all the foregoing reasons, we affirm the dependency adjudication.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

J. WILLIAM BRAMMER, JR., Judge